Hock Hua Bank Bhd & Anor v Pengurusan Danaharta Nasional Bhd & Anor

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–26 OF 1999–II

ZAKARIA SAM JC

23 JANUARY 2002

Land Law *— Sale of land — Order for — Impeachment of — Failure to disclose plaintiff bank's equitable interest in land — Defendant vested with lands pursuant to acquisition agreement — Land charged in infringement of earlier agreements with knowledge of defendant — Legitimate expectation of plaintiff's interests in land — Whether just and equitable to order sale*

The first plaintiff carried on business as a banker and was the registered proprietor of the property described as Lot 26, Section 25, KTLD ('the property'). The second plaintiff was a subsidiary company of the first plaintiff. The second defendant, a property developer planned to develop a four storey trade centre/complex ('the development project'), to which the property was part of the development lands. By a syndicated facilities agreement, the second defendant was granted a term loan to facilitate the development project. In consideration thereof, the second defendant was to provide inter alia, first legal charges over the development lands. Pursuant to an acquisition agreement, all rights, titles and interest in the syndicated facilities agreement and the relevant charges were duly vested in the first defendant. In the meantime, the plaintiffs entered into an exchange agreement and two sale and purchase agreements ('the three agreements') with the second defendant, all three agreements carrying the same provisions of 'No Further Dealing' upon the execution of the agreements. It was agreed that the second defendant shall not without the prior written consent of the first or second plaintiff subject the development lands to any further encumbrances or additional liabilities other than those already subsisting on the titles to the development lands. All of the three agreements made with the second defendant were made with the knowledge and consent of the first defendant. At the time of the execution of the three agreements, the charges over the development lands had not been created by the second defendant as per the syndicated facilities agreement. Upon the default by the second defendant in the repayment of the loan facility granted, the first defendant took foreclosure proceedings against the development lands, which included the property. The plaintiffs applied to set aside the order for sale. The issues in this case were whether the order for sale was just and equitable in the circumstance of the case and whether the failure by the first defendant in disclosing to the court the existence of the plaintiff's equitable interest in the development lands merit the impeachment of the order for sale.

Held, allowing the plaintiff's application:

(1) In all three agreements, it was expressly stipulated that upon the execution of the agreements, the plaintiff/second defendant shall as soon as possible cause a discharge of all existing encumbrances. Here, instead of discharging the encumbrances, the second defendant without the written consent of the plaintiffs charged the development lands, containing the property, to the first defendant. The act of subsequently charging the development land was an infringement of the three agreements by both the defendants who knew and consented to the relevant clauses requiring the defendants to seek the plaintiff's written consent before encumbering the development lands. At the time when the plaintiff entered into the three agreements with the second defendant, no charges had been created and registered, and since the charges were created later without the written consent from the plaintiffs, it was clearly not just for the interest of the first defendant to take precedent over the interest of the plaintiffs (see p 207A–B, D–E).

(2) The first defendant knew that the first plaintiff had been making payments to one of the syndicated lender in consideration with the purchase of parcels of land ('the parcels') stipulated in one of the sale and purchase agreement that constituted the three agreements. At no time did the first defendant raised any objection to the payment arrangement. By consenting to the payment, it gave rise to a legitimate expectation on the part of the plaintiffs that the first defendant would disclaim all interest over the parcels or alternatively the payments made to one of the syndicated lender, in partial repayment of the loan under the syndicated facilities agreement. These payments would then be applied towards the redemption of the parcels. That being the case, when the first defendant foreclosed on the development lands, it was inequitable for the first defendant to ignore the existence of the plaintiff's equitable interest in the parcels from the order for sale. The first defendant could not sell something that essentially no longer belonged to the second defendant (see pp 207H–208C).

[Bahasa Malaysia summary

Plaintif pertama adalah bank dan merupakan pemilik berdaftar hartanah yang dikenali sebagai Lot 26, Seksyen 25, KTLD ('hartanah tersebut'). Plaintif kedua merupakan anak syarikat kepada plaintif pertama. Defendan kedua, seorang pemaju telah membuat rancangan untuk mendirikan pusat/kompleks perdagangan bertingkat empat ('projek pembangunan tersebut'), di mana hartanah tersebut merupakan sebahagian daripada tanah yang dimajukan. Melalui suatu perjanjian kemudahan bersindiket, defendan kedua telah diberi

pinjaman bertempoh untuk membiayai projek pembangunan tersebut. Sebagai balasan, defendan kedua dikehendaki memberi, antara lain, gadaian-gadaian pertama di atas tanah yang dimajukan tersebut. Menurut perjanjian perolehan, segala hak, hakmilik dan kepentingan di dalam perjanjian kemudahan bersindiket tersebut dan gadaian-gadaian yang relevan diletakhak ke atas defendan pertama. Sementara itu, plaintif telah memasukki satu perjanjian pertukaran dan dua perjanjian jual beli ('ketiga-tiga perjanjian tersebut') dengan defendan kedua dengan ketiga-tiga perjanjian tersebut mengandungi peruntukan 'No Further Dealing' setelah tiga perjanjian tersebut disempurnakan. Telah disetujukan bahawa, tanpa persetujuan bertulis terdahulu daripada plaintif pertama atau kedua, defendan kedua tidak dibenarkan meletakkan beban atau liabiliti yang lain ke atas tanah tersebut melainkan daripada beban yang sudah wujud pada hakmilik tanah-tanah yang dimajukan. Ketiga-tiga perjanjian yang dibuat dengan defendan kedua telah dibuat dengan pengetahuan dan persetujuan defendan pertama. Semasa ketiga-tiga perjanjian tersebut disempurnakan, gadaian-gadaian ke atas tanah yang dimajukan belum dibuat oleh defendan kedua seperti yang dikehendaki dalam perjanjian kemudahan bersindiket tersebut. Defendan pertama telah memulakan prosiding halang tebus terhadap tanah yang dimajukan, termasuk hartanah tersebut, setelah defendan kedua gagal menjelaskan kemudahan pinjaman. Plaintif sekarang memohon supaya perintah jualan diketepikan. Isu-isu di dalam kes ini adalah sama ada perintah jualan adalah adil dan saksama dalam keadaan kes ini dan sama ada kegagalan defendan pertama untuk mendedahkan kewujudan kepentingan ekuiti plaintif ke atas tanah yang dimajukan kepada mahkamah memeritkan cabaran terhadap perintah jualan.

Diputuskan, membenarkan permohonan plaintif:

(1) Dalam ketiga-tiga perjanjian tersebut, telah dinyatakan bahawa semasa perjanjian-perjanjian tersebut disempurnakan, plaintif/defendan kedua perlu dengan secepat mungkin melepaskan segala beban. Di sini, defendan kedua telah menggadaikan tanah yang dimajukan yang mengandungi hartanah tersebut kepada defendan pertama tanpa persetujuan bertulis daripada plaintif-plaintif. Tindakan menggadaikan tanah yang dimajukan merupakan kemungkiran ketiga-tiga perjanjian tersebut oleh kedua-dua defendan yang mempunyai pengetahuan mengenai klausa-klausa yang relevan dan yang telah bersetuju kepada klausa-klausa tersebut yang menghendaki defendan mendapat persetujuan bertulis daripada plaintif-plaintif sebelum membebankan tanah yang dimajukan. Semasa plaintif memasukki perjanjian dengan defendan kedua, tiada gadaian yang telah dibuat dan didaftarkan, dan memandangkan bahawa gadaian-gadaian tersebut dibuat kemudian tanpa persetujuan bertulis plaintif-plaintif, jelas bahawa bukan adil untuk kepentingan defendan pertama mengatasi kepentingan plaintif-plaintif (lihat ms 207A–B, D–E).

(2) Defendan pertama tahu bahawa plaintif pertama telah membuat bayaran kepada seorang pemiutang bersindiket sebagai balasan dengan pembelian beberapa bidang tanah ('bidang-bidang tanah tersebut') yang diperuntukkan dalam satu daripada perjanjian jual beli tersebut yang membentuk ketiga-tiga perjanjian tersebut. Defendan pertama tidak pernah membangkitkan sebarang bantahan terhadap cara pembayaran. Persetujuan dengan pembayaran telah membangkitkan jangkauan yang diharapkan kepada plaintif bahawa defendan pertama akan menolak segala tuntutannya di atas bidang-bidang tanah tersebut atau secara alternatif, bayaran yang dibuat kepada seorang daripada pemiutang bersindiket, sebagai sebahagian daripada bayaran balik pinjaman di bawah perjanjian kemudahan bersindiket tersebut. Bayaran tersebut kemudiannya akan digunakan untuk penebusan bidang-bidang tanah tersebut. Memandangkan keadaan tersebut, apabila defendan pertama menghalang tebus tanah yang dimajukan, ia tidak saksama bagi defendan pertama untuk tidak mempedulikan kepentingan ekuiti di dalam bidang-bidang tanah tersebut daripada perintah jualan. Defendan pertama tidak boleh menjual sesuatu yang tidak lagi menjadi kepunyaan defendan kedua (lihat ms 207H–208C).]

Notes

For cases on order for sale generally, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3582–3673.

Cases referred to

Buxton & Anor v Supreme Finance (M) Bhd [1992] 2 MLJ 481 (refd)
Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (refd)
Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Intervenors) [1996] 2 MLJ 431 (refd)
Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal [1991] 3 MLJ 163 (refd)
MUI Bank Bhd v Cheam Kim Yiu (Beh Sai Ming, Intervener) [1992] 2 MLJ 642 (refd)
Public Bank Bhd v Narayanasamy [1971] 2 MLJ 32 (refd)
Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors [1997] 2 MLJ 105 (refd)

Legislation referred to

Rules of the High Court 1980 O 7 r 2, O 20 r 11, O 92 r 4
Sarawak Land Code (Cap 81) s 148(2)

Frank Tang King Hung (*Tang & Partners*) for the plaintiff.
Lim Lip Tze (*Reddi & Co*) for the first defendant.
Sheena Chua (*Cheng & Associates*) for the second defendant.

Zakaria Sam JC: This is an originating summons taken out by the plaintiffs under O 7 r 2 of the Rules of the High Court 1980 ('the RHC'), for inter alia, the following reliefs:

(i) a declaration that the plaintiff's have an equitable interest in the parcels 1.17, 2.18, 3.18 and 4.18 of the Trade Centre at Merdeka Plaza as described in the schedule to the originating summons ('the said parcels);

(ii) a declaration that the order for sale of the said parcels dated 15 September 1998 and made in Originating Summons No 24–165–98–III(II) is not just, in the circumstances of the case; and

(iii) an order that the order for sale dated 15 September 1998 and all ancillary orders thereto vide originating summons No 24–165–98–III(II) be set aside in so far as the same relates to the said parcels.

Background

The first plaintiff, carries on business as a banker and is the registered proprietor of the property described as Lot 26, s 25, KTLD.

The second plaintiff, carries on business as a finance company and is a subsidiary company of the first plaintiff. The second plaintiff is the registered proprietor of the property described as Lot 12, s 25, KTLD.

The second defendant, a property developer planned to develop Lots 1–9, 12–14, 21, 25 and 26, all of ss 25, KTLD (the development lands) into Four Storey Trade Centre/Complex to be known as Merdeka Plaza.

By a syndicated facilities agreement dated 13 July 1995, Arab-Malaysian Merchant Bank ('AMMB'), as the manager and security agent for itself, EON Bank Bhd ('EON'), Sabah Bank Bhd ('SBB') and Interfinance Bhd ('IFB'), as the syndicated lenders, agreed to grant to the second defendant, a term loan facility to the extent of RM8,400,000 and syndicated bridging loan facility of RM46,600,000. In consideration thereof, the second defendant was to provide inter alia, first legal charges over the development lands.

Pursuant to an acquisition agreement dated 27 April 1999, a vesting certificate dated 24 May 1999 was issued whereby all AMMB's, SBB's and IFB's all right, titles and interest in the syndicated facilities agreement and the relevant charges had been duly vested in the first defendant.

In the meantime, on 25 November 1995, the first plaintiff entered into the following agreements with the second defendant:

(i) an exchange agreement whereby the first plaintiff agreed to exchange Lot 26 s 25 KTLD for parcel 1.17 with the second defendant; and

(ii) a sale and purchase agreement ('HHB purchase agreement') whereby the first plaintiff agreed to purchase from the second defendant parcel Nos 2.18, 3.18 and 4.18 to be constructed on the development lands by the second defendant at a purchase price of RM3,764,190.

On the same day, the second plaintiff entered into a sale of purchase agreement ('HT sales agreement') with the second defendant, whereby the second plaintiff agreed to sell to the second defendant Lot 12 s 25 KTLD for the purchase price of RM1.2m which shall be set off against the purchase price payable by the first plaintiff under HHB purchase agreement.

All the three agreements carry the same provisions of 'no further dealing' upon the execution of the said agreements. It was agreed that the second defendant shall not without the prior written consent of the first or the second plaintiff subject the parcels or the development lands to any further encumbrances or additional liabilities other than those already subsisting on the titles to the said parcels and the development lands at the date of the agreements.

(The exchange agreement, HHB purchase agreement and HT sales agreement, after this referred to as 'the three agreements').

All the above three agreements made with the second defendant were made with the knowledge and consent of the first defendant (by virtue of the syndicated facilities agreement dated 13 July 1995 and the acquisition agreement dated 27 April 1999).

At the time of the execution of the abovesaid agreements between the plaintiffs and the second defendant, the charges over the development lands have not been created by the second defendant (as stipulated by the syndicated facilities agreement).

The charges were created and registered later by:

(i) memorandum of charge vide Instrument No 1668/1996 over Lots 21 and 25 of s 25 KTLD, registered on 23 January 1996 which include parcels 1.17, 2.18, 3.18 and 4.18 sold to the first plaintiff (the first charge) (as varied by Memorandum of Variation of Charge Instrument No L 16452/97 on 16 July 1997).

(ii) memorandum of charge vide Instrument No L 8754/1997 on 6 April 1997 over Lots 1, 2, 4, 6, 7, 8, 9, 13 and 14, all of s 25 KTLD (most of the development lands) — (the second charge).

(iii) Memorandum of Charge vide Instrument No L 166004/97 on 11 July 1997 over Lot 3, s 25 KTLD (the third charge).

Upon default by the second defendant in the repayment of the facilities granted, the first defendant took foreclosure proceedings against the development lands which by then included the said parcels. The order for sale was granted on 15 September 1998.

The plaintiffs' case

The plaintiffs are contending that they have an equitable interest in the parcels that have been purchased and the order for sale was unjust because of the non-disclosure of two material facts by the first defendant, namely:

(i) The plaintiffs were bona fide purchaser for value of the parcels within the building erected on the development lands that was subject to

order for sale dated 15 September 1998, thus, having an equitable interest in the parcels. Both the defendants had full knowledge and consented to the same.

(ii) The second defendant did not obtain the plaintiffs' written consent before further charging the development lands, in breach of an express term of the agreements, hereinbefore described and did not request the plaintiffs to subordinate their equitable interest in the parcels or disclose the existence of the plaintiffs' equitable interest in the parcels which formed part of the development lands referred to in the foreclosure proceedings.

It is also the plaintiffs' case that they were not informed by either the first or second defendant of the existence of such charges. This was only discovered through other sources after the order for sale of the charged lands Lots 1–4, 6–9, 13–14, 21 and 25 had been made. Had the plaintiffs been given notice of the originating summons, they would have applied to intervene to protect their interest.

First defendant's case

It is the argument of the learned counsel for the first defendant that the order for sale of charged land is a final order unless appealed against and once it was made, drawn up and perfected, the judge was functus officio and thereafter has no power to set aside the said order. It was further submitted that the order was made on an inter parte application. Eventhough the instant application is by way of a fresh action, the plaintiffs failed to show that the said order for sale was obtained by way of fraud or that the order was null or void on the ground of illegality or lack of jurisdiction which are the only grounds which the court can set aside the order.

It is also the first defendant's case that at the time when the first and second plaintiff entered into the exchange agreement, HHB purchase agreement and HT sale agreement, the first plaintiff knew or ought to have known that the charged lands including the said parcels which have to be constructed on the charge lands are or would be charged to the first defendant as stated in the syndicated facilities agreement and the sale of the said parcels were specifically made subject to the said charges.

The second defendant through its counsel informed the court it has no objection to the plaintiffs' application.

Findings

The principal issue here is whether the order for sale was just in the circumstances of the case. It is clear that foreclosure of the parcels and the development lands is within the ambit and contemplation of s 148(2) of the Sarawak Land Code (Cap 81), which provides that an order for sale could only be made as in the circumstances seem just. In light of the statutory provisions, equity was brought into play (see *Kuching Plaza Sdn Bhd v Bank Bumiputra Malaysia Bhd and another appeal* [1991] 3 MLJ 163; *Keng Soon*

Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, Intervenors) [1996] 2 MLJ 431). A

An order for sale of charged land is a final order unless appealed against. Once it is made, drawn up and perfected, the judge is functus officio and therefore has no power to set aside the order for sale. Hence, the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or drawn up, except under the slip rule in O 20 r 11 of the RHC so far as is necessary to correct error in expressing the intention of the court. The court may, however, set aside a judgment entered by default or made in the absence of a party at the trial or hearing (see *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143, *MUI Bank Bhd v Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 2 MLJ 642 and *Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors* [1997] 2 MLJ 105). Nevertheless, there are exceptions — if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment (see *Hock Hua*'s case). B C D

It is clear in this instant summons that the order for sale of the development lands had been drawn up and perfected.

The plaintiffs have no right to appeal against the decision since they were not made a party to the foreclosure proceedings. They could not intervene as they had no prior notice of the foreclosure proceedings. Under such circumstances, the only recourse is for the plaintiffs to take out this summons — a fresh action to set aside the said order. E

The pertinent question here is whether the failure by the first defendant to disclose to court the existence of the plaintiffs' equitable interest in the said parcels, merit the impeachment of the order for sale?

The learned counsel for the first defendant argued that the first defendant's interest over the parcels is a legal (registered) interest, whereas the plaintiffs' interest are only equitable in nature. Citing the case of *Buxton & Anor v Supreme Finance (M) Bhd* [1992] 2 MLJ 481, he submitted that the interest of the registered chargee is indefeasible and that the interest of a bona fide purchaser for value cannot prevail over a registered chargee. The plaintiffs' equitable interest cannot in law be awarded priority over the legal interest of the first defendant. F G

It is pertinent to note that eventhough the syndicated facilities agreement was executed on 13 July 1995 the charges were only created and registered on 23 January 1996, 16 April 1997 and 11 July 1997, sometime after the plaintiffs had entered into the three agreements with the second defendant (on 25 November 1995), and with the knowledge and consent of the first defendant. The HHB purchase agreements and HT sales agreements carry the same provisions of 'no further dealing' that upon the execution of the said agreement, the second defendant shall not without the prior written consent of the plaintiffs subject the parcels or the development lands to any further encumbrances or additional liabilities other than those already subsisting on the titles to the said parcels and the development lands at the date of the agreements. H I

A In all the three agreements, it was expressly stipulated that upon the execution of the agreements the plaintiff/second defendant shall as soon as possible cause a discharge of all the existing encumbrances.

Here, instead of discharging the encumbrances the second defendant without the written consent of the plaintiffs charged the development lands
B containing the parcels, to the first defendant.

The act of subsequently charging the development lands is an infringement of the agreements by both the defendants who knew and consented to the relevant clauses requiring the defendants to seek the plaintiffs' written consent before encumbering the development lands and the parcels subsequent to the execution of the agreements.

C It is the submission of the learned counsel for the plaintiffs that had the defendants requested from the plaintiffs prior written consent, the plaintiffs would have insisted for the exclusion of the said parcels from the charges.

The plaintiffs had performed all their respective obligations under the three agreements. To date the plaintiff had paid about RM2.18m of the
D purchase price leaving a balance of RM564,628.50 as the same is not yet due for payment. In fact, upon receiving the vacant possession of the parcels on 6 July 1997, the first plaintiff spent nearly RM1m in renovation, with the view to occupy the premises in a reasonable time.

As far as I am concerned, at the time when the plaintiffs entered into
E the three agreements with the second defendant, no charges had been created and registered, and since the charges were created later without the written consent from the plaintiffs, it is clearly not just for the interest of the first defendant to take precedent over the interest of the plaintiffs over the parcels.

The first defendant could not deny knowledge of the existence of the
F requirement for the plaintiffs' prior consent in the said agreements. Clause 7.02(a)(iv)(1) of the syndicated facilities agreement entered into between the first and second defendant provides, as a condition precedent, before any drawn down on the facility is to be made, the first defendant must be in receipt of certified true copies of the sales and purchase agreements executed between the second defendant and the respective
G registered proprietors of the development lands and the terms and conditions of which shall be acceptable to the first defendant.

The first defendant knew and consented to the purchase of the parcels by the plaintiffs from the second defendant. The first defendant knew that the plaintiffs had been making payments into the second defendant's
H account with SBB (one of the syndicated lenders). Exhibits LCK 7, LCK 8, LCK 9, LCK 10 and LCK 11 were all copies of the covering letters for the remittances made by the plaintiffs on the purchase price. These letters were copied to the M/S Goh & Partners, Advocates, the defendants mutual solicitors. Even in exhs LCK 6, a letter from second defendant instructing the first plaintiff to make payment on the purchase price of the parcels to
I the second defendant's account and it was clearly stated in the letter that *the said instruction may not be revoked or amended save with the written consent of the first defendant.* This letter was also copied to the first defendant. The first

defendant, therefore, knew that the first plaintiff was making payment on the parcels to SBB. At no time did the first defendant raise any objection on this payment arrangement. By consenting to the payment, it gave rise to a legitimate expectation on the part of the first plaintiff that the first defendant would disclaim all interests over the said parcels or alternatively, the payments were made to SBB, one of the syndicated lender, in partial repayment of the loan under the syndicated facilities agreement. These payments would then be applied toward the redemption of the parcels. That being the case, when the first defendant foreclosed on the development lands, it is inequitable for the first defendant to ignore the existence of the plaintiffs' equitable interest in the parcels from the order for sale. The first defendant cannot sell something that essentially no longer belong to the second defendant (see *Public Bank Bhd v Narayanasamy* [1971] 2 MLJ 32).

The first defendant should not be allowed to take advantage of the plaintiffs' failure to register their interest in the parcels because of the covenant in the agreements upon which the plaintiffs agreed not to caveat the parent titles that contained the parcels.

Conclusion

The non-disclosure of the facts that the plaintiffs were the bona fide purchaser for value of the parcels and the conduct of the defendants for not obtaining the plaintiffs' written consent before charging the development land, make it not just to order the sale of the said parcels.

Order 92 r 4 of the RHC provides that the court has inherent powers to make an order as maybe necessary to prevent injustice or to prevent any abuse of the process of court.

In the above premises, I hold that the order for sale dated 15 September 1998 was not regularly obtained. The plaintiffs' application is hereby allowed with costs.

Plaintiff's application allowed.

Reported by Peter Ling